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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CINCINNATI FIREFIGHTERS UNION,
LOCAL UNION NO. 48,
Petitioner,

v.

TILFORD YOUNGBLOOD, *et al.*,

and

JOHN W. DALZELL, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourteenth Amendment permits race to serve as a basis for a preference for promotions in government service where the sole justification for the preference is the fact that black candidates for promotion scored lower than white candidates on a competitive examination, the validity of which is unquestioned.

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals were: Cincinnati Firefighters Union, Local No. 48, Intervenor-Appellant; Tilford Youngblood and Ralph Nichols, Plaintiffs-Appellees and the class they represent; and John W. Dalzell, Harold Latimer, Arthur Hull, William Clarke, Henry J. Sandman, and Bert A. Luganani, Defendants-Appellees, all of whom were officials of the City of Cincinnati.

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The petitioner, Cincinnati Firefighters Union, Local No. 48, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 804 F.2d 360, and is reprinted in Appendix A, pp. 1a-12a.

The memorandum decision of the United States District Court for the Southern District of Ohio is reported at 625 F.Supp. 30, and is reprinted in Appendix B

pp. 13a-24a, and its Order For Compliance as Appendix C at pp. 25a-28a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1986 and is reprinted as Appendix D, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By statute in Ohio, fire department vacancies in positions above the rank of "regular fireman" must be filled by competitive promotional examinations. The relevant portions of the Ohio Revised Code (ORC §§ 124.37, 124.45, 124.46, and 124.48) are set forth in Appendix E hereto, pp. 31a-35a.

STATEMENT OF THE CASE

1. Statement of Facts

Petitioner is the exclusive collective bargaining representative for approximately 800 employees in the Cincinnati, Ohio, Fire Department below the rank of assistant chief. It is party to a collective bargaining agreement with the city which provides that no party will change the terms of the agreement without the approval of the other party. The contract incorporates by reference the Ohio state statutes regarding promotion procedures.

Promotions in fire departments in Ohio above the rank of "regular fireman" are regulated by state statute. That statute requires vacancies in such ranks to be filled by

competitive promotional examinations. ORC §§ 124.45. The results of such examinations dictate the standing of applicants for promotion on eligibility lists. ORS § 124.46. During the two-year life of each list, all vacancies must be filled from the list in rank order, beginning with the individual receiving the highest grade on the examination. ORC § 124.45.

Respondents Tilford Youngblood and Ralph Nichols (hereafter "Youngblood") were black applicants for employment in the Cincinnati Fire Department who filed suit in 1973 charging that the Department discriminated based on race in the promotion of firemen and in the recruiting, testing and hiring of applicants for the entry level position of fire recruit. Respondents John Dalzell et al (hereafter "the City") were city officials who were responsible for Department practices. Petitioner was not a party to that suit. By a consent decree entered on May 7, 1974, Respondents settled the suit. App. B, pp. 13a-14a.

In the consent decree, the City denied that it had engaged in any of the alleged discrimination. Paragraph 27 of the consent decree provided as follows regarding promotions:

> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

Id.

In 1984, the City conducted a promotional examination for the position of Fire Lieutenant and then published an eligibility list for the position. Black candidates comprised one-sixth of the employees deemed eligible for promotion. The black candidate who received the highest score on the competitive examination which formed the basis for the list was ranked 23rd. The validity of the examination not only was never questioned, the test was

formally admitted to be free of discrimination in the trial Court. App. B, pp. 14a-15a.

By March 1985, the City had promoted 19 firefighters from the list to lieutenant in accordance with the statutory procedure, i.e. by their rank on the list. All were white. It became apparent that no more than one black would be promoted during the life of the eligibility list. App. B, p. 15a.

2. The Proceedings Below

A. The District Court

Youngblood moved in the District Court to enforce paragraph 27 of the consent decree to require promotion of black candidates at the rate at which they were represented in the applicant pool. The City supported this motion and an agreed-order to do so was submitted to the District Court. The order required every sixth vacancy to be double-filled; both the sixth person on the eligibility lists and the highest ranking black candidate (in the first instance, the 23rd ranked on the list) would be awarded a promotion to lieutenant. App. C, pp. 26a-27a.

At the end of the 2-year life of the list, no further vacancies would be deemed to occur until all of the double-filled positions (i.e. artificially-created vacancies) were absorbed into the employment complement. App. C, p. 27a. Thus, the consent order submitted to the Court had the effect of postponing any new competitive examination and resultant eligibility list until all black candidates promoted under the double-filling scheme had filled positions which otherwise would have been filled by the highest ranking candidates in a competitive examination, in accordance with statutorily-mandated promotion procedures.

Seniority begins to accrue on the date of appointment to a rank. By state law, eligibility to compete for further promotion up the ranks requires a specified amount of time in the next lower rank. Credits for seniority are added to the grades of those competing in promotional

examinations. ORC § 124.45. The consent order submitted to the District Court delayed this accrual of seniority for those persons denied the right to compete for the promotions filled by absorption of the lower-scoring black candidates into the lieutenant's rank.

Petitioner intervened to oppose entry of the consent order for compliance. Over the objection of the union, the District Court held that paragraph 27 of the consent decree does "mandate affirmative action in the area of promotions" and that "the proposed double-filling plan is an acceptable mechanism for achieving greater minority representation in the promoted ranks." App. B, pp. 16a-17a.

Despite a finding that the City "has never admitted past discrimination and its denial of discrimination is expressly embodied in . . . the Consent Decree," the District Court found that the City's "commitment to affirmative action" and a City Council resolution that "blacks are underrepresented in the promoted ranks within the Fire Division" proved "a demonstrated need" for the relief contained in the order and a government interest in [its] implication." App. B, p. 19a. The lower court then concluded that the voluntary affirmative action proposed was reasonably related to its objectives and entered the consent order. App. B, pp. 19a-22a.

B. The Court of Appeals

The Court of Appeals applied the Title VII standards set forth by this Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) to this Fourteenth Amendment challenge. App. A, p. 10a. It found the consent order of compliance "manifestly reasonable" and "clearly . . . designed to break down the patterns of racial segregation that gave rise to the consent decree." App. A, p. 11a. It held that the delay in promotion caused by the absorption provision of the order was "not too great a burden to impose upon the nonminority candidates." App. A, p. 12a.

In affirming the District Court, the Court of Appeals distinguished this Court's decision in *Wygant v. Jackson Board of Education* —— U.S. ——, 90 L.Ed2d 260 (1986) on the ground that nonminority employees shouldered a lesser burden here because they were not actually displaced from employment. App. A, p. 9a.

REASONS FOR GRANTING THE WRIT

I. The consent order of compliance is wholly at odds with this Court's decisions in *Wygant* and *Stotts*

In *Wygant*, this Court reaffirmed that to survive Fourteenth Amendment scrutiny, racial preferences or classifications "must be justified by a compelling governmental interest." —— U.S. at ——, 90 L.Ed2d at 268 (citations omitted) (Powell, J.); —— U.S. at ——, 90 L.Ed2d at 275 (O'Connor, J.). Specifically, the Court held that "a public employer . . . must ensure that, before it embarks on an affirmative action program . . . it must have sufficient evidence to justify the conclusion that there has been prior discrimination." —— U.S. at ——, 90 L.Ed2d at 271. A federal court reviewing the racial classification "must make a factual determination that the employer had *a strong basis in evidence* for its conclusion that remedial action was necessary." (Emphasis added). *Id.*

The lower courts here made no such findings. Instead, they assumed from bare statistics that discrimination had occurred; this despite an outright denial of discrimination in the consent decree itself.

This is not a case of remedying pervasive or egregious discrimination. Indeed, there is no evidence of discrimination at all. This is simply a case of disappointment by parties to a consent decree that a promotion program neutral on its face and admitted to be non-discriminatory resulted in fewer blacks being promoted than the parties had hoped. Thus, because only one black firefighter scored

high enough on the competitive examination to achieve a promotion during the life of the eligibility list, the respondents relied on the naked statistic that one-sixth of the applicant pool for promotion was black to double-fill every sixth promotional vacancy and then delay all other promotions until the double-filled positions were fully absorbed into the officer complement. In approving this relief, the lower courts acted contrary to *Wygant*.

Furthermore, this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), confirms that an individual must prove that he was a victim of intentional discrimination in order to receive an award of competitive seniority in a § 1983 case. 467 U.S. at 582, n.16. The advantage created by the absorption procedure for the persons in the double-filled positions constitutes an award of superseniority in the lieutenant's rank. Other employees whose promotional opportunities are delayed while the double-fillers are absorbed and who ultimately will receive promotions based solely on their higher test scores, will be junior to these non-victims as lieutenants. By state law (ORC § 124.37), they will be the first to be demoted in a force reduction because they will be younger in point of service in the rank. Moreover, they will be denied the opportunity to compete for promotions to higher ranks as readily as the non-victim beneficiaries of the absorption procedure because they will not have satisfied the statutory service requirement as early. ORC § 124.45.

The burden these innocent firefighters are being forced to bear by the consent order is not light. Five persons, will not receive a timely promotion because of the order. They would have been promoted, except for the order. They now must wait for the next vacancy to occur—only after all of the double-filled jobs are absorbed. The permanent seniority impact on these passed-over employees at this time is not certain; they certainly are losing

income in the interim. The long-run effect of the deferral of seniority, however, is fixed and inevitable.

The statutory plan would require appointment by examination as soon as a position in a higher rank became vacant. Seniority rights, including accrual of the time for eligibility to compete for promotion into the next rank, begin with a person's date of appointment into a position. Seniority has been delayed for five employees eligible for lieutenant for months if not years. In *Stotts*, this Court considered a delay of just one month to be a matter "of substance". 467 U.S. at 571-572.[1]

Wygant also requires that, assuming the State's interest is compelling, "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' *Fullilove* [*v. Klutznick*, 448 U.S. 448 (1980)] at 480." —— U.S. at ——, 90 L.Ed.2d at 268. The means chosen by the respondents here was not so narrowly tailored. Expansion of the officers' ranks, as occurred during the period of double-filling, would have assured no impact on innocent white candidates. Continued double-filling would also have served the same purpose. The absorption-by-attrition procedure worked to require the nonminority employees to shoulder a burden which it was unnecessary to have shouldered. The consent order consequently conflicts with the second prong of the *Wygant* analysis as well.

II. The lower courts' blind subservience to bare statistics presents the same issues presently before the Court in *Johnson v. Transportation Agency*, No. 85-1129, and *United States v. Paradise*, No. 85-999

By their actions, respondents have simply extended affirmative action preference on an ad hoc basis whenever, for any reason, the success record of minority can-

[1] The lower courts' holding that the consent order "did not affect any firefighter's seniority rights" (App. A, pp. 8a-9a; App. B, pp. 22a-23a) is clearly erroneous.

didates on valid examinations does not match the proportion of minority candidates in the pool of applicants. This is as clear a use of naked racial preference as can be demonstrated.

Rather than inquire for root causes of the statistical disparity or make any effort to improve the examining process, which would be true affirmative action, respondents would automatically apply a quota on an ad hoc basis.

In *Johnson v. Transportation Agency*, this Court is considering this same question in a Title VII context. In *U.S. v. Paradise*, the authority of a federal court under the Fourteenth Amendment to enforce a one-to-one promotion quota is at issue. The instant case presents an amalgam of both of these questions. This petition appropriately should be granted as well, or at least held for consideration in light of the decisions which will be entered in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative held pending the Court's disposition of *Johnson* and *Paradise* for consideration in light of the opinions therein issued.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3628

TILFORD YOUNGBLOOD, *et al.*,
Plaintiffs-Appellees,

v.

JOHN W. DALZELL, *et al.*,
Defendants-Appellees,

v.

CINCINNATI FIREFIGHTERS UNION,
Intervenor-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed November 7, 1986

Before: LIVELY, Chief Judge; MERRITT, Circuit Judge; and CONTIE, Senior Circuit Judge.

LIVELY, Chief Judge. In this civil rights action the intervenor, Cincinnati Firefighters Union, appeals from an order for compliance with a consent decree, entered with the approval of the original plaintiffs and defend-

ants. The order for compliance related to promotions to the rank of lieutenant in the Cincinnati fire department, and required every sixth vacancy at that rank to be "double filled." The union opposed the order, contending that the order preferred black applicants for promotion who were not shown to have been actual victims of unlawful discrimination and that this preference worked to the detriment of white applicants who were innocent of any unlawful discrimination. After careful review of the record, we affirm.

I.

Two rejected black applicants for appointment to the position of "fire recruit" filed this action in 1973. They sought class certification and declaratory and injunctive relief, charging various Cincinnati city officials with "racial discrimination in the promotion of firemen and in the recruiting, testing and hiring of applicants for the position of fire recruit." The complaint also prayed for affirmative relief to remedy past racially discriminatory practices, citing the fact that Cincinnati had an almost all-white fire department. The plaintiffs claimed violations of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983.

The parties eventually agreed to a consent degree, which was approved by District Judge David S. Porter, and entered as an order of the court on May 7, 1974. The defendants denied that they had engaged in discriminatory acts against black applicants in recruiting, selecting and hiring or in promoting, but recognized that past practices might give rise to "an inference of a pattern or practice of discrimination" in the past. The decree referred to steps already taken to avoid such an inference and provided for additional measures to be taken for this purpose. The decree certified a class consisting of "all minority persons who have applied since January 1, 1968, or who might hereafter apply for the position of fire recruit in the Division of Fire and all minority firemen

currently employed by the Division of Fire who have sought since January 1, 1968, or might hereafter seek promotion within the Division of Fire."

Paragraph 27 of the consent decree dealt with promotions:

> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

The order for compliance was based on paragraph 27.

II.

Ohio law requires that vacancies in positions above the rank of "regular firemen" be filled by competitive promotional examinations. Ohio Revised Code (ORC) § 124.45. Eligibility lists are compiled by placing the names of applicants who successfully complete an examination in rank order, beginning with the one receiving the highest grade. When a vacancy occurs the person having the highest position on the list must be appointed. Each eligibility list has a life of two years and all vacancies within the two year period must be filled from the list. ORC § 124.46. When a vacancy occurs in a promoted rank, and no eligibility list (one in effect for two years or less) exists for that rank, the Civil Service Commission is required to conduct a new competitive promotional exam. ORC § 124.48.

Cincinnati conducted a competitive examination for the rank of lieutenant in the fire department in 1981 and the list was published in 1982. Because no black candidates were ranked sufficiently high to make their promotion likely the Ohio Civil Rights Commission sought an order of enforcement under paragraph 27 of the consent decree. The intervenor union did not object to the entry of an order for compliance requiring vacancies to be

"double filled," concluding that any detrimental effect on its members would be minimal. Subsequently, at the urging of some of its members the union did appeal the order. However, this court held, in an unpublished opinion, that the union lacked standing to appeal since it had suffered no injury.

Several vacancies in the rank of lieutenant occurred shortly after the expiration of the 1982 list. A new exam was given in 1984 and a new eligibility list containing more than 200 qualified candidates was published on September 26, 1984. The highest ranked black candidates were numbers 23, 42, 43, 67, 90 and 99. By March 11, 1985, the city had promoted 19 firefighters from the 1984 list to lieutenant, and all were white. At the rate vacancies were occurring it was clear that not more than one black firefighter would be promoted to lieutenant from the 1984 list. The plaintiffs then filed a motion to require enforcement of paragraph 27 by use of the double filling technique. The city supported the motion, noting a resolution of the City Council of October 19, 1984 that declared, "blacks are under-represented in the promoted ranks" and that expressed support "for the City administration to obtain the judicial order necessary to make affirmative action promotions to the position of fire lieutenant."

The district court granted the motion over the opposition of the intervening union. The order of enforcement required that each sixth vacancy be double filled with the highest ranked black candidate on the eligibility list. When the sixth vacancy occurred, the person who was sixth on the list as originally published would be at the top of the list, the five higher ones having been promoted to fill the first five vacancies. That person would be promoted and, in addition, the highest ranked black candidate, number 23, would also be promoted to lieutenant. When the twelfth vacancy occurred, the then highest ranked person would receive that promotion and, in addi-

tion, number 42, the highest ranked black candidate, remaining on the list would be promoted to an additional position.

The order concluded with the provision that when the 1984 promotion list expired, "a vacancy for Civil Service purposes will not occur until all double filled positions are absorbed into the complement." This "absorption" clause is the primary focus of the intervenor on appeal. The order for compliance also provided that it would dissolve upon expiration of the current eligibility list.

III.

On appeal the intervenor argues that the district court exceeded its authority in entering the order for compliance. The union asserts that the district court erred by relying solely on a disparity in test results to order double filing. It relies on the fact that there has been no proof that the 1985 examination was discriminatory and contends that some proof of intentional discrimination was required before the district court could invoke an affirmative remedy. Citing *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S. Ct. 2576 (1984), the intervenor also argues that the district court erred by imposing a remedy not provided for within the four corners of the consent decree. As it had in the district court, the union took the position in its brief that the district court erred by granting preferential treatment to black candidates who had not been proven to be victims of racial discrimination. In view of the Supreme Court's disposition of a similar "victim specificity" argument in *Sheet Metal Workers v. E.E.O.C.*, —— U.S. ——, 106 S. Ct. 3019 (1986), and *Firefighters Local No. 93 v. City of Cleveland*, —— U.S. ——, 106 S. Ct. 3063 (1986), this point was not pressed at oral argument. See *Geier v. Alexander*, —— F.2d —— (No. 84-6055, decided September 5, 1986) for this court's treatment of the same argument.

The appellees distinguish *Stotts* on a number of grounds. They point out that the district court in *Stotts* imposed a remedy that affected the seniority system of the Memphis firefighters, an issue not raised by the order for compliance in the present case. The district court's order in *Stotts* required white firefighters with greater seniority to be laid off while black firefighters with less senority were retained during a period of reduction in forces. This remedy was ordered as a modification of a consent decree which did not deal with layoffs in any fashion. The appellees argue that *Stotts* provides no guidance in the present case because seniority and layoffs are not involved and the order for compliance did not modify the consent decree. They maintain that the order merely approved a remedy agreed to by the parties to the decree and that this remedy is clearly within the intendment and meaning of paragraph 27.

The intervenor and the appellees agree that paragraph 27 is unambiguous; yet they disagree on its meaning. The union reads the language as permitting affirmative action only after a finding of actual discriminatory conduct, as for example, administering a racially discriminatory exam. The appellees, pointing out that paragraph 27 requires the city to *use* a system for promoting qualified minority firefighters, state that the decree clearly authorizes affirmative remedies. Since the plaintiffs and the defendants entered into a consent decree that provided for use of a system of promotions that would advance qualified minority members of the force, no finding of specific discriminatory acts was required, the appellees maintain. They assert that the enforcement order is lawful when tested by standards set forth by the Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and by principles enunciated by this court in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), and *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983).

IV.

Double filling is accomplished by the creation and filling of duplicate positions when designated vacancies occur. For example, under the 1982 order for compliance, on four occasions when a vacancy in the rank of lieutenant occurred, two appointments to the rank were made. The person at the top of the eligibility list was promoted along with the highest ranked black candidate on the list. The black appointee did not displace anyone on the list. No white candidate who otherwise would have been promoted was denied a promotion because of the requirement for double filling. Every vacancy that occurred during the life of the 1982 list was filled by the highest ranked candidate on that list. All were white. The positions filled by the "paired" black candidates were not actual vacancies; they were additional lieutenant positions that the city agreed to create to achieve the goal of the consent decree.

Similarly, no white candidate who would have been promoted from the 1984 list in the absence of the enforcement order was denied a promotion. Every vacancy for the position of lieutenant that occurred during the life of the 1984 eligibility list was filled in rank order. As a step toward its goal of a firefighting force that would be representative of the racial makeup of its population, the city created an additional lieutenant position for each sixth vacancy and filled it with a qualified black candidate.

Since every vacancy during the life of each eligibility list was filled by appointing the highest ranked candidate from the list, there was no detriment to any ranked candidate during the life of the list. The expiration of each list meant that those whose names were on it were no longer eligible for promotion. All promotions after the expiration date would be made from a new list to be compiled on the basis of the scores achieved on a new promotion examination. The only change effected by the

order for compliance related to the timing of a subsequent competitive exam following the expiration of an eligibility list. Ordinarily, at the time the first vacancy occurred after the expiration of a list, a new exam would be administered and the vacancy would be filled by appointing the candidate who ranked first on that examination. Under the absorption provision of the consent decree, the new examination was postponed until the persons appointed to the double fill positions were absorbed into the regular complement of lieutenants by death, retirement or resignation.

Thus, the only detriment to any firefighter flowing from the order for compliance consisted of a delay in the time when he or she would become eligible to compete for promotion. No one was denied a promotion by operation of the absorption clause. All eligibility ended with the expiration of each eligibility list. No one who was on a previous eligibility list was carried over to the next one. A person whose number was not reached before the expiration of a particular eligibility list went back to "square one." Only by making a passing grade on a subsequent exam could a firefighter again become eligible for promotion. The order for compliance changed none of these rules. The new examination would produce a new eligibility list and all vacancies again would be filled in rank order from that list.

V.

A.

We agree with the appellees that *Stotts* is not controlling. In the present case the district court did not undertake to modify a consent decree by issuing an order concerning a matter on which the decree was silent. Rather, the court ordered compliance with a specific provision of the decree, the one related to a system of promotions. In addition, the order in this case did not affect

any firefighter's seniority rights, and it did not involve layoffs. The loss of a job is obviously a more serious detriment to an employee than the delay in an opportunity to establish eligibility for a promotion. The intervenor also relies on *Wygant v. Jackson Board of Education*, — U.S. —, 106 S. Ct. 1842 (1986), where a plan that extended preferential protection against layoffs to minority employees was found to be an impermissible method of remedying present effects of past discrimination. Again, *Wygant* is distinguishable because it involved a plan by which nonminority public employees were displaced by minority employees. It was not a case where "the actual burden shouldered by nonminority [employees] is relatively light." *Id.* at 1851, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980).

The consent decree in the present case did not contain quotas. Instead, it established a goal of having a workforce in the Division of Fire that would be 18% black by 1980. When this goal was not achieved, the decree was modified by agreement to give the city until the end of 1985 to reach the goal. In dealing with promotions paragraph 27 used no numbers at all. But it did require the city to use some system of promoting qualified minority firefighters in order to achieve the goal of a workforce that would negate any inference of an unlawful promotion policy based on racial discrimination.

The intervenor also argues that the consent decree was not voluntary. It is clear that the consent decree is not invalid merely because the union did not agree to it. *Firefighters v. City of Cleveland*, — U.S. —, 106 S. Ct. at 3079. The plaintiffs and the city voluntarily agreed to the terms of the decree, and the fact that it was not a subject of collective bargaining with the union is immaterial. The consent decree did not interfere with any right secured by collective bargaining, a fact recognized by the union when it decided not to oppose the 1982 order for compliance. Most important, however, is the fact

that the consent decree imposed no duties or obligations on the union. An intervenor is entitled to have its interest considered, but it may not block a consent decree, agreed to by parties, by merely withholding its approval. *Id.* The consent decree was voluntary. By entering into the decree with its requirement for affirmative action to dispel inferences of discrimination based on the racial composition of the firefighting force the city recognized a compelling governmental interest in providing increased opportunities to minority individuals who aspired to be firefighters and to move up through the ranks. We conclude that the consent decree itself is valid. However, this conclusion does not end our inquiry.

B.

Although the intervenor has attacked the validity of the consent decree itself, the particular issue in this appeal is whether the order for compliance contains a permissible remedy. The Supreme Court approved a voluntary agreement between a private employer and a union that involved race-conscious relief in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The Court held that a voluntary race-conscious affirmative action plan is permissible when it is "designed to break down old patterns of racial segregation," when it does not "unnecessarily trammel the interests of white employees" and when it constitutes only "a temporary measure" designed "not to maintain a racial balance but simply to eliminate a manifest racial imbalance." *Id.* at 208. *Weber* involved a challenge under Title VII of the Civil Rights Act of 1964 and in *Firefighters v. City of Cleveland* the Supreme Court did not reach the issue of whether there might be other considerations under a Fourteenth Amendment challenge. 106 S.Ct. at 3078 n.8. Nevertheless, we believe that the same basic considerations apply when a race-conscious remedy is challenged under the Equal Protection Clause of the Fourteenth Amendment.

The order for compliance seems manifestly reasonable to us. It clearly is designed to break down the patterns of racial segregation that gave rise to the consent decree. When the decree was entered there was one black lieutenant in the Cincinnati fire department, and when the 1984 competitive examination was given ten years later only five of 105 lieutenants were black. This condition did not change in the first six months under the new eligibility list. The next promotions to lieutenant went to white candidates. It is equally clear that the double filling plan did not "unnecessarily trammel" the interests of white candidates for promotion. No white candidate who would otherwise have been promoted off the 1984 eligibility list failed to receive a promotion. Finally, the remedy contained in the order for compliance was temporary, since it dissolved automatically when the 1984 eligibility list expired.

On several occasions the Supreme Court has stated that race-conscious remedies must be "narrowly tailored" to achieve a legitimate goal in furtherance of a compelling governmental interest. *Wygant v. Jackson Board of Education*, 106 S. Ct. at 1846; *Fullilove v. Klutznick*, 448 U.S. at 480. Justice Powell, who provided the "swing vote" in *Sheet Metal Workers v. E.E.O.C.*, applied similar standards in concluding that the race-conscious remedy in that case was valid under the Constitution as well as under Title VII. 106 S. Ct. at 3054-55 (Powell, J., concurring in part and in judgment). The order for compliance in this case was carefully crafted by a distinguished district judge whose even-handedness and concern for fairness to all parties is displayed throughout the record. No qualified white candidate for promotion was denied advancement and only qualified black candidates received promotions. The city accepted the burden of appointing lieutenants not otherwise required at the time of appointment and the only price any member of the force was required to pay was

a delay in the time when he or she might have the opportunity to qualify for promotion to fill a future vacancy. This is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black firefighters from the promoted ranks. *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981) (reasonable for persons innocent of wrongdoing to bear some burden in order to correct effects of past wrongs); *Williams v. Vukovich*, 720 F.2d 909, 919 (6th Cir. 1983) (a simple reduction in nonminority expectations for promotion does not render a consent decree unreasonable).

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 8774

TILFORD YOUNGBLOOD, *et al.*,
Plaintiffs,

vs.

JOHN DALZELL, *et al.*,
Defendants.

[Filed July 8, 1985]

OPINION

PORTER, S.J.:

This matter is before the Court on plaintiffs' motion for enforcement of consent decree (doc. 170), defendant's memorandum in response (doc. 172), defendant's brief (doc. 178), plaintiffs' reply to intervenor-union's motion opposing enforcement (doc. 179), intervenor's substituted brief in opposition (doc. 181), and plaintiffs' post-hearing memorandum (doc. 183). A hearing on the motion to enforce the Consent Decree was held June 25, 1985. At the hearing, plaintiffs requested that some of intervenor's exhibits be excluded from evidence on grounds of irrelevancy and hearsay. The Court now overrules all those motions.

FACTS

This case originated in 1973 when plaintiffs filed a civil rights class action alleging that the City of Cin-

cinnati was engaged in racially discriminatory recruiting, testing, selecting, and promoting of firefighters in violation of the fourteenth amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1983. On May 7, 1984, without trial of the issues and with no admission of discrimination on the part of the City, the parties entered into a Consent Decree (doc. 39). The Decree set a goal of increasing the percentage of black firefighters from the less than one-half of one percent employed in 1973 to eighteen percent by 1980. When that goal was not met, the Decree was modified to give the City until the end of 1985 to meet the goal (doc. 121).

The Decree also called for efforts to increase the proportion of blacks in the promoted ranks. Paragraph 27 provides:

> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of workforce composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

Ohio law requires competitive promotional examinations to establish eligibility lists from which firefighters will be promoted in rank order when vacancies occur. O.R.C. §§ 124.45, 124.46, 124.48. Seniority affects promotions only indirectly. A small seniority credit of one point for each of the first four years of service and sixtenths of one point for each year thereafter is added to the scores on the competitive exam. O.R.C. § 124.45. In the event that two or more people achieve identical scores, seniority will also determine the order in which those people will be ranked. O.R.C. § 124.46. Otherwise persons are simply promoted in rank order during the life of the eligibility list whenever a vacancy occurs.

In September 1984, the City administered a promotional exam for the rank of fire lieutenant. At that time, only five of the 105 lieutenants were black. The eligibil-

ity list resulting from the 1984 exam ranked the highest blacks 23rd, 42nd, 43rd, and 67th. To date, nineteen vacancies have occurred in the lieutenant rank and all of these promoted to fill the vacancies have been white. It is likely that during the life of the current list, which expires in September 1986, only one black will be promoted, resulting in continued under-representation of blacks among the lieutenants.

Plaintiffs now request that this Court order that the 1974 Consent Decree requires the City to promote firefighters to the rank of lieutenant so as to result in blacks being promoted in sufficient numbers. Plaintiffs argue that the number of blacks promoted should be equal to the ratio of blacks to whites in the applicant pool. The ratio of blacks to whites in the applicant pool for the current lieutenant eligibility list is one to six (doc. 170, exhibit C). The plaintiffs contend that this result can be achieved by double-filling positions as was done in this case when promotions to the rank of lieutenant were last made (doc. 128). Basically, this procedure would require that every sixth position filled at the rank of lieutenant would be filled with two people—both the highest ranking white person and the highest ranking black person on the eligibility list. The City also supports this procedure for furthering the goals stated in the Consent Decree (doc. 178).

The Cincinnati Firefighters Union, Local 48 requested and was granted permission to intervene (docs. 171, 175). The union-intervenor opposes the double-filling plan for reasons that will be elaborated below.

DISCUSSION

The issue before the Court is whether paragraph 27 of the Consent Decree requires affirmative action in promotions, and specifically, whether the plan of double-filling proposed by the plaintiffs and defendant is consistent both with the Consent Decree and federal law.

For the reasons set forth below, we conclude that double-filling as described in the accompanying Order fulfills the affirmative action requirement of the Decree, and is a permissible method of increasing the number of minorities in the promoted ranks of the firefighters.

I.

This is not the first time that this Court has been faced with this issue and has determined that such relief is appropriate. In 1982, the Ohio Civil Rights Commission, plaintiff-intervenor, sought a similar order of enforcement with regard to the fire lieutenant eligibility list resulting from the City's 1981 promotion examination (doc. 122). Although the firefighters union later unsuccessfully appealed this Court's 1982 Order, at the time of the hearing on that Order the union did not object to the proposed motion (doc. 130 at 8, *et seq.*). In fact, when the Assistant Attorney General stated that he believed, "The proposed order . . . effects . . . a good balance between the interest of the city, the union, and the Ohio Civil Rights Commission," the union did not object. *Id.* at 3. Moreover, at the 1982 hearing, the union recognized that the costs of complying with the proposed order were "very little" (doc. 130 at 9) and that further litigation of the matter would necessarily involve investigating the validity of the promotion test which would be much more expensive. *Id.* The union acknowledged that the 1982 Order struck a "very good balance between all of these interests [the city, the Civil Rights Commission and the union] which . . . are genuine and sincere interests." *Id.*

Now, however, the union-intervenor opposes enforcement of the Consent Decree as proposed by plaintiffs and defendants (docs. 176, 181). According to the union, paragraph 27 does not mandate affirmative action in the area of promotions, but instead merely sets out a goal of achieving improved minority representation at all ranks.

We disagree. The plain meaning of paragraph 27 is that the City will *use* a procedure that will ensure that qualified minority persons are promoted. As will be discussed in greater detail below, the proposed double-filling plan is an acceptable mechanism for achieving greater minority representation in the promoted ranks, and should therefore be the mechanism used in promotions during the remaining life of the 1984 lieutenant eligibility list.

II.

Intervenor union also suggests that relevant federal case law has changed since 1982 so as to make affirmative action such as the double-filling impermissible. The union apparently relies on *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), in which the Supreme Court held that a court cannot impose a consent decree to award competitive seniority to a minority employee who has not been shown to be an actual victim of discriminatory practices. After careful consideration of *Stotts*, however, we conclude that it is not controlling. Moreover, we have examined other relevant Supreme Court decisions as well as various Sixth Circuit decisions on affirmative action issued since *Stotts*, and we are convinced that the enforcement of the Consent Decree that we have ordered is permissible.

A.

In *United Steelworkers v. Weber*, 443 U.S. 193 (1979) the Supreme Court held that Title VII of the Civil Rights Act of 1964 "does not condemn all private, voluntary, race-conscious affirmative action plans." 443 U.S. at 208. Although the Court declined to specify what made an affirmative action plan impermissible, it did note some of the features of the challenged plan that apparently led to the conclusion that it was permissible. For example, the approved plan was a voluntary one, aimed at breaking down racial segregation, a purpose

similar to that of the Civil Rights Act itself. The plan was also only a temporary measure intended to eliminate "manifest racial imbalance," not to maintain racial balance. *Id.* Moreover, the plan did not "unnecessarily trammel the interests of the white employees" because it did not require that any white workers be replaced by blacks, nor did it create an "absolute bar" to white employees' advancement. *Id.*

Although these factors are not irrelevant to the instant case, they alone are not dispositive because the present litigation involves constitutional claims under 42 U.S.C. §§ 1981, 1983. The Supreme Court's guidance on such constitutional claims is more diffuse than that concerning Title VII claims, however, and it must be discerned from cases such as *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The United States Court of Appeals for the Sixth Circuit has observed that, "The only clear consensus to be garnered from these various statements is that in any affirmative action program (1) some governmental interest must be served, and (2) the program must somehow be directed toward the achievement of that objective." *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir.), *modified on rehearing*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984).

The Sixth Circuit has concluded that the standard established in *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 F.2d 938 (1981) continues to be applicable in constitutional cases. 704 F.2d at 885. Thus, the fourteenth amendment is not violated if (1) there is a need for remedial measures and a government interest in their implementation, and (2) the proposed remedy is reasonable in light of the circumstances. *Id.* at 886-87.

The need for remedial measures and the government's interest in their implementation are satisfied in the

present case. The government clearly has an interest in "ameliorating the disabling effects of identified discrimination." *Id.* at 886 *citing Fullilove v. Klutznick*, 448 U.S. at 497 (Powell, J., concurring). Although it is not necessary to show past intentional discrimination, some competent governmental body must find that there is a need for remedial measures, and court review of those findings must reveal a sound basis for them. 704 F.2d at 886. The Sixth Circuit has held that a determination of past discrimination by the Detroit Board of Commissioners was sufficient to meet this requirement. *Young*, 608 F.2d at 694.

In the present case, the City of Cincinnati has never admitted past discrimination and its denial of discrimination is expressly embodied in paragraphs 5 and 6 of the Consent Decree (doc. 39). Nonetheless, the City has explicitly expressed its commitment to affirmative action such as that contemplated by paragraph 27 of the Decree (doc. 170, exhibit B). Moreover, the City Council passed a resolution on October 10, 1984 in which it stated that "blacks are under-represented in the promoted ranks within the Fire Division." *Id.* The City's conclusion is supported by statistics provided by the City, indicating that in October 1984 only five of 105 fire lieutenants were black, only three of 137 drivers were black, and all other promoted ranks were completely white (doc. 170, exhibit A). One of the five black lieutenants was recently promoted to captain, making him the only black among the 48 captains (doc. 170 at 3). Therefore, we conclude that there is a demonstrated need for the proposed remedial measures and a government interest in their implementation.

The second aspect of determining the propriety of the plan is to determine whether it is reasonably related to its objectives. The Sixth Circuit has stated that a plan meets this aspect of the test if the non-minority personnel affected are not "unduly stigmatized by the pro-

gram" and if "the particular program applies the use of racial classifications reasonably." *Bratton*, 704 F.2d at 890. A plan is not stigmatizing if those hired or promoted under it are qualified for the job. *Id.* at 891. The *Bratton* court also suggested that a plan will be found reasonable if (1) it is substantially related to the objective of remedying past discrimination, (2) use of racial classification reflects the only legitimate way of achieving that objective, (3) it is temporary, and (4) it does not unnecessarily trammel the interests of the non-minority group. *Id.* at 892.

Applying these criteria to the present case, we find that the proposed affirmative action plan is non-stigmatizing and reasonable. The plan is non-stigmatizing because all of the blacks who will be promoted under it are qualified for the job, having passed the lieutenant eligibility exam. Moreover, although the candidates are ranked by numerical score, the top ranking candidate's score was only ten points above that of the 34th ranked candidate; less than four points separates the 20th and 40th candidates. Thus, it is hard to argue that the blacks ranked 23, 42 or 43 are not qualified for the job.

Furthermore, the plan uses racial classifications reasonably. The goal of the plan is to increase the representation of minorities in the promoted ranks of the firefighters. The dearth of blacks in those ranks, as outlined above, gives rise to an inference of adverse racial impact in the promotion system, and therefore of past discrimination. *See* EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. 1607.4(D) (1984). Without using racial classifications there would be no way to overcome the effects of this past discriminatory impact. Moreover, the plan is temporary. Contrary to the union's claim that plaintiffs are seeking to make a "permanent institution" of double-filling, this plan will be in effect only for the life of the 1984 lieutenants' eligibility list. Indeed, both plaintiffs and the Court anticipate the day

when the Consent Decree itself is implemented fully and this case can be closed.[1]

Finally, the proposed plan is reasonable because it does not unnecessarily trammel the interests of the non-minority groups. No white officers will be replaced by blacks. Nor will any whites be permanently barred from advancement. In fact, there does not appear to be any significant detriment to any non-minority as a result of the proposed double-filling. At most, there might be a brief delay in the promotion of two or three white firefighters, but even this brief delay would only occur at the termination of the 1984 eligibility list when the double-filled positions are being absorbed into the force. Such a modest detriment, should it in fact occur, falls far short of constituting good cause for not implementing the plan. The Sixth Circuit has held that reduction in a non-minority's expectations of promotion is not sufficient to make a consent decree unfair or unreasonable. *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983). According to the Sixth Circuit, "Since non-minorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices, it follows that the legal rights of non-minorities will not be adversely affected by *reasonable* and *lawful* race conscious hiring or promotional remedies." *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484-85 (6th Cir. 1985), *citing Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983). Accordingly, the Sixth Circuit upheld a more intrusive affirmative action plan that had more extensive detriment to whites than the one we now approve. *Vanguards*, 753 F.2d at 484-85. For all of the foregoing reasons, the Court therefore concludes that the double-filling plan is permissible as a nec-

[1] To that end, this Court will issue periodic show cause orders requiring the parties to demonstrate why the Decree should not end.

essary remedy in which the government has an interest and which does not stigmatize or unreasonably affect the non-minorities involved.

Nothing in the Supreme Court's decision, *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), changes the above analysis because that decision is clearly inapplicable to the facts before us. *Stotts* involved a district court ordered modification of a consent decree over the objection of one of the parties to the decree. The consent decree had established an affirmative action program aimed at increasing the number of blacks in the Memphis fire department, but it was silent on the subject of layoffs. After the City of Memphis ordered layoffs, the district court ordered that the decree be modified to forbid the City from using its seniority system to the extent that it would result in a decrease in the percentage of black firefighters. Both the City and the union objected to the modification. Although the Sixth Circuit approved the district court action, the Supreme Court invalidated the change. Among the facts that contributed to the Court's conclusion that the modification of the decree should be invalidated were (1) that the decree was silent on layoffs (104 S.Ct. at 2586), (2) that the City opposed the change (*id.* at 2590), (3) that there was no finding of actual discrimination (*id.* at 2588-90), and (4) that the change affected a bona fide seniority system (*id.* at 2587-90).

None of these factors is present in the case before us. The Consent Decree we seek to enforce contains at paragraph 27 an explicit commitment to some form of affirmative action in promotions. Moreover, the City agrees that this is the plain meaning of the paragraph and joins the plaintiffs in supporting the specific procedure of double-filling as the means to accomplish that end. Although there is no finding of actual discrimination, it is unnecessary in this case because this is only an effort to enforce a consent decree voluntarily entered into. Finally,

the affirmative action procedure we now approve will have no impact on the seniority system of the firefighters. This is because promotions are not based upon seniority, but on scores achieved in competitive examinations.

Our conclusion that *Stotts* is inapplicable here is buttressed by the Sixth Circuit's consistent conclusion that *Stotts* does not bar voluntary affirmative action plans. In *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3692 (Mar. 26, 1985), the Sixth Circuit upheld an affirmative action plan that resulted from "voluntary decisions in the collective bargaining process," and which provided that layoffs of minority teachers would be limited in the event of a reduction in force. 746 F.2d at 1158. In *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984), the Sixth Circuit approved the City of Detroit's voluntary affirmative action plan for hiring minorities, 750 F.2d at 44-45. Finally, in *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), the Sixth Circuit upheld a voluntary consent decree that required the establishment of two separate promotion lists for blacks and whites, with promotions to be made alternately from each list.

All three of these affirmative action plans differed from the situation in *Stotts* because none of them was imposed by the district court over the objection of any of the parties involved. *Stotts* had relied heavily on two provisions of Title VII, § 704(h) and § 706(d), both of which limit a court's power to award particular relief in Title VII cases. Neither of these sections forbids an employer's voluntary actions to provide such relief, however, an issue that the *Stotts* Court explicitly reserved. 104 S.Ct. at 2590. Thus, the law in the Sixth Circuit clearly is that when a public employer voluntarily agrees to an affirmative action plan involving hiring (*Van Aken*), promotions (*Vanguards*), or layoffs (*Wygant*), it is permissible. As long as the court does not impose

a remedy over the objections of one of the parties, *Stotts* is inapplicable. Such voluntary affirmative action plans are constitutionally permissible in the Sixth Circuit.

In addition to limiting the application of *Stotts*, all of the Sixth Circuit opinions discussed above make it clear that the standards for determining the reasonableness of an affirmative action plan remain those applicable in the Sixth Circuit prior to *Stotts*. *See Wygant*, 746 F.2d at 1157-58; *Van Aken*, 750 F.2d at 45; *Vanguards*, 753 F.2d at 487-89. Thus, the standards established in *Weber*, *Young*, and *Bratton* that were discussed above continue to be the operative ones for determining the permissibility of the instant Consent Decree. As we demonstrated already, the plan here approved clearly meets those requirements. Thus, we conclude not only that the double-filling is permissible, but also that voluntary affirmative action is indeed alive and well in the Sixth Circuit.

SO ORDERED.

/s/ David S. Porter
DAVID S. PORTER
United States Senior
District Judge

July 8, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 8774

Judge Porter

TILFORD YOUNGBLOOD, *et al.*,
Plaintiffs

vs.

JOHN DALZELL, *et al.*,
Defendants

[Filed July 8, 1985]

ORDER FOR COMPLIANCE

The Plaintiffs and Defendants herein have been and continue to be parties to a Consent Decree entered in this action in May of 1974. The Consent Decree imposes certain affirmative obligations upon the Defendants to increase minority representation within the Fire Division of the City of Cincinnati. The Consent Decree provides for specific steps to achieve affirmative action in entry level positions, and provides for a general obligation to conduct promotions in an affirmative manner. Paragraph 27 of the Consent Decree states that:

> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a workforce com-

position which negates any inference of an unlawfully discriminatory promotion policy based on race.

Blacks are currently under-represented in the promoted ranks within the Fire Division. A promotional examination for the position of Fire Lieutenant was recently administered on August 28, 1984; the results of said examination were posted on September 26, 1984; and the promotional eligible list resulting therefrom will expire on September 25, 1986. No minority candidates have been among the nineteen individuals promoted to date, and it is unlikely that more than one minority candidate will receive promotion during the life of the list if promotions are made in rank order. The parties believe that under the Consent Decree blacks should be promoted at the rate at which they are represented in the applicant pool.

The purpose of this Order is to provide a specific method for taking affirmative action in promoting minorities to the position of Fire Lieutenant. It is hereby ordered with the agreement of the Plaintiffs and the City Defendants that compliance with the Consent Decree's obligations at the promotional level shall be accomplished in the following manner:

All positions to be filled in the rank of Fire Lieutenant shall be filled by rank order promotion from the eligibility list with the following exceptions:

At the time of the entry of this Order the following appointments shall be made: the black candidate ranked number 23 shall be appointed to double fill the position filled by the sixth person promoted from the current eligibility list. The black candidate ranked number 42 shall be appointed to double fill the position filled by the twelfth person promoted from the eligibility list. The black candidate ranked number 43 shall be appointed to double fill the position filled by the eighteenth person promoted from the list.

Additional regular vacant positions will be filled in rank order until the 24th person from that list is so promoted to a vacant position, at which time that same position shall be double filled with the next highest ranking black candidate. This double filling will occur with every sixth position filed so that when the 30th person from the list is promoted to a vacant position, the same position shall be double filled with the next highest ranking black candidate. When the 36th person from the list is promoted to a vacant position, the same position shall be double filled with the next highest ranking black candidate. When the 42nd person from that list is promoted to a vacant position, the same position shall be double filled with the next highest ranking black candidate, and so on. Double-filling will occur in this manner during the life of the list. The above reference to the 24th, 30th, 36th and 42nd persons promoted refers to actual numbers of persons promoted, as opposed to their numerical position on the list, since retirements, deaths, etc., may cause these to differ.

Persons who are promoted by double-filling are, from the time of appointment, to be accorded all rights and privileges, including but not limited to seniority, accorded those who are otherwise promoted from the promotional eligibility listing.

Upon expiration of the 1984 promotion list for lieutenants, a vacancy for Civil Service purposes will not occur until all double filled positions are absorbed into the complement. Nothing herein shall restrict the right of the City to increase or decrease its fire division complement at any time it deems such actions necessary.

This Order shall be dissolved upon the expiration of the current civil service eligibility list for the position to Fire Lieutenant.

Entered this 7th day of July, 1985.

/s/ David S. Porter
United States District Judge

Agreed:

/s/ Ronnie E. Dixon
RON E. DIXON
Counsel for Plaintiffs

/s/ Timothy M. Ruttle
TIMOTHY M. RUTTLE
Counsel for City Defendants

Have seen:

JAMES HENGLEBROK
Counsel for the Firefighters Union

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3628

TILFORD YOUNGBLOOD, *et al.*,
Plaintiffs-Appellees,

v.

JOHN W. DALZELL, *et al.*,
Defendants-Appellees,

v.

CINCINNATI FIREFIGHTERS UNION,
Intervenor-Appellant.

[Filed Nov. 7, 1986]

Before: LIVELY, Chief Judge; MERRITT, Circuit Judge; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of said District Court in this case be and the same is hereby affirmed.

It is further ordered that Appellees recover from Intervenor-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

APPENDIX E

Ohio Revised Code:

§ 124.37 Removals, reappointments, and demotions in police and fire departments.

When it becomes necessary in a police or fire department, through lack of work or funds, or for causes other than those outlined in section 124.34 of the Revised Code, to reduce the force in such department, the youngest employee in point of service shall be first laid off. Should a position in the police or fire department once abolished or made unnecessary be found necessary to be re-created or re-established within three years from the date of abolishment, or should a vacancy occur through death, resignation, or any other cause within three years from the date of the abolishment of the position or layoff, the oldest employee in point of service of those laid off shall be entitled to the position, providing he was at the date of his separation a regular and permanent employee. If any employee laid off as prescribed in this section, enters into the active service of the army, navy, marine corps, or other armed service of the United States, the period such employee serves therein shall not be considered in the determination of the three years stipulated as a maximum time within which reinstatements shall be made; such three-year period shall be computed exclusive of the time the employee spent in the armed services. When a position above the rank of patrolman in the police department and above the rank of regular fireman in the fire department is abolished, and the incumbent has been permanently appointed, he shall be demoted to the next lower rank and the youngest officer in point of service in the next lower rank shall be demoted, and so on down until the youngest person in point of service has been reached, who shall be laid off.

§ 124.45 Promotion of firemen.

Vacancies in positions above the rank of regular fireman in a fire department shall be filled by competitive promotional examinations, and promotions shall be by successive ranks as provided in this section and sections 124.46 to 124.49 of the Revised Code. Positions in which such vacancies occur shall be called promoted ranks.

When a vacancy occurs in the promotional rank immediately above the rank of regular fireman, no person shall be eligible to take the examination unless he has served twenty-four months in the rank of regular fireman, provided in those cases where there are less than two persons in the rank of regular firemen who have served twenty-four months therein and are willing to take the examination, the twenty-four month service requirement does not apply.

When a vacancy occurs in a promoted rank, other than the promoted rank immediately above the rank of regular fireman, no person shall be eligible to take the examination unless he has served twelve months in the rank from which the promotion is to be made, provided in those cases where there are less than two persons in such next lower rank who have served twelve months therein and are willing to take the examination the twelve months service requirement shall not apply. If the nonapplication of the twelve month service requirement to persons in the next lower rank does not produce two persons eligible and willing to compete, then the same method shall be followed by going to successively lower ranks until two or more persons are eligible and willing to compete in an examination for the vacancy. In the event this process of searching successively lower ranks reaches the rank of regular fireman, the twenty-four month service requirement applies, pro-

vided in those cases where such application still fails to produce two persons who are eligible and willing to compete, said twenty-four month service requirement does not apply. In the event two persons are unwilling to compete for such examination, then the one person who is willing to compete shall be appointed to fill the vacancy after passing a qualifying examination.

* * * *

Those persons who compete in a promotional examination in accordance with the rules of the civil service commission shall have added to their grade credit for seniority. Credit for seniority shall be given as follows: one point shall be added for each of the first four years of service and six-tenths of a point shall be added for each year for the next ten years of service. In computing the credit for seniority, half of the credit above set out shall be given for a half year of service. Credit for seniority shall be based only on service in the municipal or civil service township fire department and the service provided for in the next succeeding paragraph.

When service in a municipal or civil service township fire department is interrupted by service in the armed forces of the United States, seniority credit shall be granted in promotional examinations for the time so served. No additional credit for military service shall be allowed in promotional examinations.

Credit for efficiency may be given as an added credit and shall be ten per cent of the member's efficiency rating for the last year and shall be based on the record of efficiency maintained in the fire department in the manner established by the civil service commission, provided the efficiency shall be graded by three ranking officers of the fire department familiar with the work for the member. In those cases where three such officers do not exist the

ranking officers or officer familiar with the work of the member shall grade the efficiency.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's grade unless the applicant achieves at least the minimum passing grade on the examination without counting such extra credit.

* * * *

§ 124.46 Eligible lists for firemen.

The names of the examinees shall be placed on the eligible list in accordance with their grades; the one receiving the highest grade shall be placed first on the list. In the event two or more examinees receive the same grade, seniority in the fire department service shall determine the order of their names. The person having the highest position on the list shall be appointed in the case of a vacancy. Eligible lists established as provided in this section shall continue for two years. In the event a vacancy occurs prior to the expiration of the two year period, the list shall continue for the purpose of filling such vacancy until the vacancy has been filled.

Where an eligible list exists and a vacancy occurs which may be filled from such eligible list, the vacancy shall be filled within a period of not more than ten days from the date of such vacancy.

§ 124.48 Filling of vacancies.

Whenever a vacancy occurs in a promoted rank in a fire department and no eligible list for such rank exists, the appointing authority shall certify the fact to the civil service commission, and the civil service commission shall within sixty days of such vacancy conduct a competitive promotional examination. After such examination has been held, an eligible list shall be established within twenty days of the final date, of the revised rating key or answer in-

spection date and the civil service commission shall certify to the appointing authority the name of the person receiving the highest grade. Upon such certification, the appointing authority shall appoint the person so certified within ten days.

When an eligible list is in existence and a vacancy occurs in a position for which the list was established, the appointing authority shall certify the fact to the civil service commission. The person standing highest on such list shall be certified to the appointing authority, and such person shall be appointed within ten days.

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NO. 86-1279

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CINCINNATI FIREFIGHTERS UNION,
LOCAL UNION NO. 48
Petitioner

v.

TILFORD YOUNGBLOOD, et al.
and
JOHN W. DALZELL, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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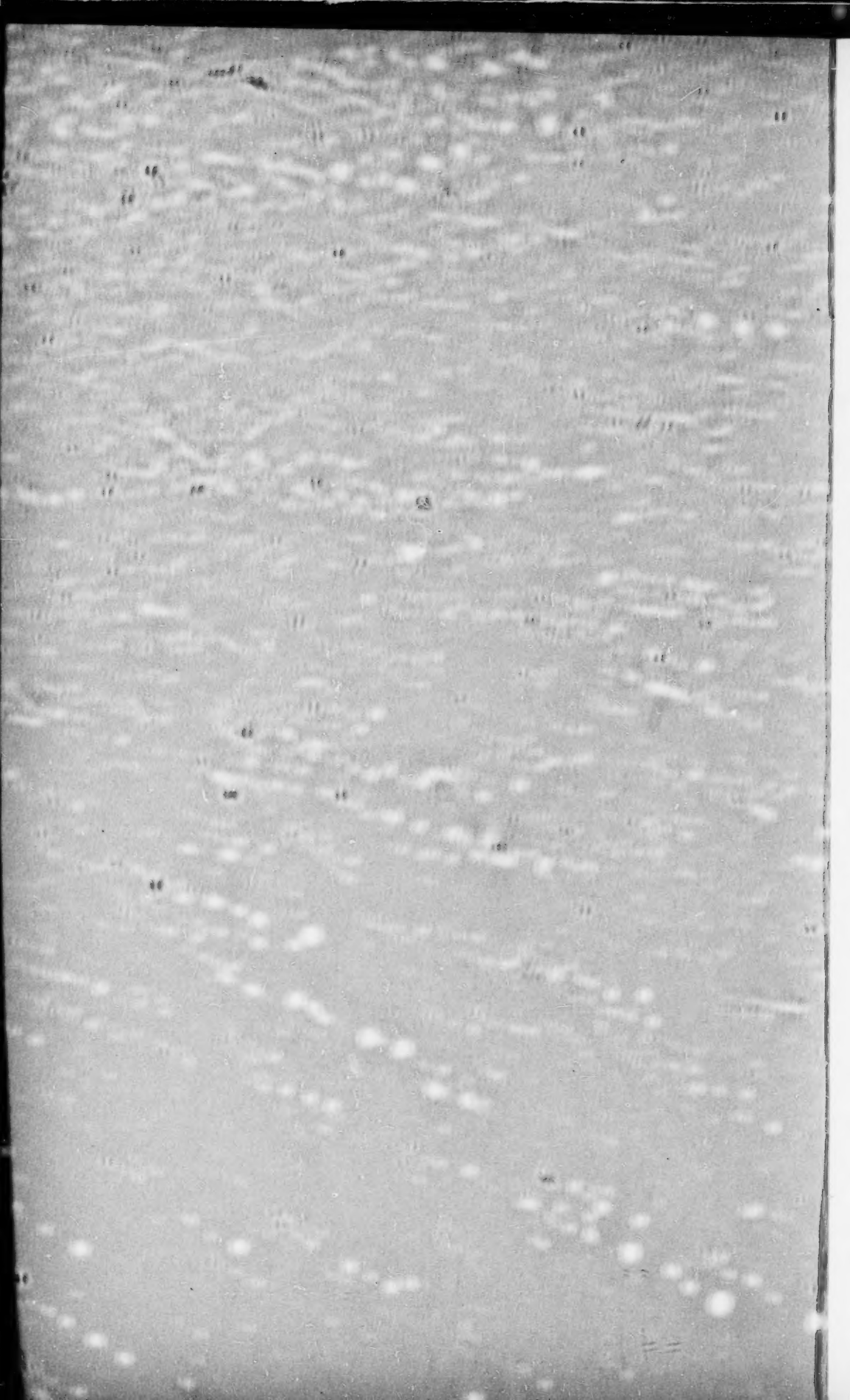

QUESTION PRESENTED FOR REVIEW

Whether the Fourteenth Amendment permits race to serve as a basis for a preference for promotions in government service where the government employer has obligated itself by a consent decree to remedy underrepresentation of minorities within its workforce, and where the results of a competitive examination for promotion within the workforce will produce minimal minority advancement.

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals were: Cincinnati Firefighters Union, Local No. 48, Intervenor-Appellant; Tilford Youngblood and Ralph Nichols, Plaintiffs-Appellees and the class they represent; and John W. Dalzell, Harold Latimer, Arthur Hull, William Clark, Henry J. Sandman, and Bert A. Lugannani, Defendants-Appellees, all of whom were officials of the City of Cincinnati.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, John W. Dalzell, et al., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 804 F.2d 360, and is reprinted in petitioner's Appendix A, pp. 1a-12a.

The memorandum decision of the United States District Court for the Southern District of Ohio is reported at 625 F. Supp. 30, and is reprinted in petitioner's Appendix B, pp. 13a-24a, and its Order for Compliance in petitioner's Appendix C at pp. 25a-28a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1986 and is reprinted in petitioner's Appendix D, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By statute in Ohio, fire department vacancies in positions above the rank of "regular fireman" must be filled by competitive promotional examinations. The relevant portions of the Ohio Revised Code (ORC Sections 124.37, 124.45, 124.46, and 124.48) are set forth in petitioner's Appendix E, pp. 31a-35a.

STATEMENT OF THE CASE

1. Statement of Facts

Respondents Tilford Youngblood and Ralph Nichols (hereafter "Youngblood") were black applicants for employment with the Fire Division of the City of Cincinnati who brought this suit as a class action to the trial court in 1973, alleging that the City of Cincinnati's policies in recruiting, testing, selecting and promoting firefighters were racially discriminatory in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983. Respondents John Dalzell, et al. (hereafter the "City"), were the city officials named as defendants in the suit.

On May 7, 1974, without trial of the issues and with no admission of discrimination on the part of the City, the parties entered into a consent decree which was approved by District Judge David S. Porter. The decree provided for measures to be taken to avoid "an inference of a pattern or practice of discrimination" in the past. Specifically, as it relates to promotions, the decree at paragraph 27 provides:

> "Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race."

The order for compliance, which was at issue in both the District Court and Court of Appeals below, was based on paragraph 27.

2. The Proceedings Below

A. The District Court

In 1984, the City administered a promotional examination for the rank of Fire Lieutenant, the results of which were likely to perpetuate the underrepresentation of blacks in that rank if Ohio law governing promotions were followed.

Youngblood filed a motion for enforcement of paragraph 27 of the decree, requesting that the District Court order the promotion of black candidates at the rate at which they were represented in the applicant pool by a "double-fill" process. The City argued in support of the motion and the proposed promotion plan. Moreover, the City's legislative body had expressed its commitment to an affirmative action plan, stating in a resolution passed on October 10, 1984 that "blacks are underrepresented in the promoted ranks within the Fire Division." The City further provided statistical documentation demonstrating that as of October, 1984, only five of the 105 Fire Lieutenants were black. Pet. App. B, p. 14a. Finally, the City argued that, given the composition of candidates on the two-year eligibility list for Fire Lieutenant, not more than one black would achieve that rank.

Petitioner intervened to oppose entry of the consent order for compliance. The Court, however, after a hearing held on June 25, 1985, and over the union's objection, held that paragraph 27 of the decree mandates affirmative action in the area of promotions and that "the proposed double-filling plan is an acceptable mechanism for achieving greater minority representation in the promoted ranks." Pet. App. B, p. 17a.

The order of enforcement required that each sixth

vacancy be double-filled with the highest ranked black candidate on the eligibility list. The order also provided that when the 1984 promotional eligibility list expired, "a vacancy for Civil Service purposes will not occur until all double filled positions are absorbed into the complement." Pet. App. C, p. 27a. Finally, the order provided that it would dissolve upon expiration of the current eligibility list.

Petitioner thereafter appealed the Court's decision to the Sixth Circuit Court of Appeals.

B. The Court of Appeals

Petitioner argued on appeal that the district court exceeded its authority in approving the order for compliance by relying solely on the disparity in test results to justify such an affirmative action plan. Respondents denied that the order was based upon bare statistics, asserting that paragraph 27 of the decree contemplates such a system of promotions that would advance qualified minorities within the Fire Division.

Petitioner further argued that the "absorption" provision of the order for compliance, wherein the double-filled positions are absorbed into the complement upon attrition occurring after the expiration of the eligibility list, is sufficiently detrimental to nonminority firefighters to invalidate the order.

The Court of Appeals affirmed the judgment of the district court, finding that "the double filling plan did not 'unnecessarily trammel' the interests of white candidates for promotion." Pet. App. A, p. 11a. In distinguishing the decisions in both *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984) and *Wygant* v. *Jackson Board of Education*,

____ U.S. ____, 106 S. Ct. 1842 (1986), the Court also found the order for compliance to be "manifestly reasonable" as a means for breaking "down the patterns of racial segregation that gave rise to the consent decree." Pet. App. A, p. 11a.

ARGUMENT

1. The consent order of compliance is countenanced by this Court's decision in *Firefighters Local No. 93 v. City of Cleveland,* and distinguishable from the Court's decision in *Wygant* and *Stotts.*

In its petition, the union argues that the district court exceeded its authority in entering the order for compliance. Citing *Wygant* v. *Jackson Board of Education*, ____ U.S. at ____, 90 L. Ed.2d at 271 (1986) petitioner maintains that the trial court failed to make sufficient findings to conclude that remedial action was necessary within the Fire Division. Petitioner further argues that *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984) precludes the imposition of an affirmative action order not provided for within the four corners of the original consent decree, and prohibits the granting of preferential treatment to individuals not proven to be actual victims of racial discrimination.

The instant case is easily distinguishable from both *Stotts* and *Wygant*. Unlike the district court in *Stotts*, the trial court did not approve a modification of the original decree concerning a matter on which that decree was silent. Rather, the court ordered compliance with a specific provision of the decree (paragraph 27) that contemplated a system of promotions to increase minority representation within the Fire Division.

Additionally, the present case is distinguishable from *Stotts* and *Wygant* in that the disputed order does not affect any firefighter's seniority rights, nor does it involve layoffs. As a result of the absorption provision of the order the only detriment that inures to any firefighter is the delay in time before he or she may compete for a future vacancy in the rank of Fire Lieutenant. The re-

quirement for double filling did not deprive any white firefighter of a promotion whose rank order otherwise insured such promotion. Those positions double filled by black candidates were additional, temporarily unnecessary Lieutenant positions that the City agreed to fund in furtherance of the goals of the decree.

The foregoing plan is obviously less intrusive than those under consideration in *Wygant* and *Stotts* where nonminorities with greater seniority suffered job losses in layoff actions. Accordingly, "the actual burden shouldered by nonminority [employees] is relatively light." *Wygant*, *supra* at 1851, quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 484 (1980).

Finally, the district court's order enforcing the 1974 decree is not rendered invalid by either *Stotts* or *Wygant* on the grounds that the beneficiaries of that order were not identified as actual victims of discrimination.

In the recent decisions of *Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S. Ct. 3019 (1986) and *Firefighters Local No. 93* v. *City of Cleveland*, ____ U.S. ____, 106 S. Ct. 3063 (1986), this Court disposed of similar "victim specificity" arguments. In *Firefighters*, the union argued in its petition for certiorari that a consent decree entered in a Title VII case is invalid if it benefits individuals who are not the actual victims of discrimination. This Court held, in making reference to *Sheet Metal Workers*, that "courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices." *Firefighters*, *supra* at 3072.

While the opinion does not address the legality of voluntarily-adopted remedies under the Fourteenth Amendment, this Court found in *Wygant* that race-

conscious plans, such as the order *sub judice*, will survive Equal Protection challenge if they are "justified by a compelling governmental interest," and are "narrowly tailored to the achievement of that goal." *Id.*, at 1846.

The subject Order for Compliance is constitutionally sound in both respects. The dearth of minorities in the promoted ranks of the City's Fire Division, as well as the legislative commitment expressed by the City's governing body, provide the requisite governmental concern for the promotion plan. Secondly, as discussed above, the plan is narrowly tailored in its purpose, and minimally intrusive to the interests of non-minority firefighters. Neither seniority nor order of layoff is directly affected by the order. Rather, it is only a brief delay in promotional possibilities that affects any firefighter with the imposition of the double fill plan. As the Court of Appeals concluded in its opinion, "[t]his is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black firefighters from the promoted ranks." Pet. App. A, p. 12a.

CONCLUSION

The approval by the courts below of the Order for Compliance should be left undisturbed. The reasoning of the courts comports with this Court's decisions in *Firefighters Local No. 93* and *Sheet Metal Workers* in that the affirmative action plan is a reasonable means, adopted and agreed to by co-respondents, to remedy the under-representation of minorities within the fire service of the City, with negligible and speculative adverse consequence to nonminorities. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS (PLAINTIFFS) IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fourteenth Amendment permits race to serve as a basis for a preference for promotions in government service where the government employer has obligated itself by a consent decree to remedy underrepresentation of minorities within its workforce, where the results of a competitive examination for promotion within the workforce will produce almost no minority advancement, and where the remedy will not deny promotion to any nonminority.

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals were: Cincinnati Firefighters Union, Local No. 48, Intervenor-Appellant; Tilford Youngblood and Ralph Nichols, Plaintiffs-Appellees and the class they represent; and John W. Dalzell, Harold Latimer, Arthur Hull, William Clark, Henry J. Sandman, and Bert A. Lugannani, Defendants-Appellees, all of whom were officials of the City of Cincinnati.

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Respondents, Tilford Youngblood, et al., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 804 F.2d 360, and is reprinted in Petitioner's Appendix A, pp. 1a-12a.

The memorandum decision of the United States District Court for the Southern District of Ohio is reported at 625 F.Supp. 30, and is reprinted in Petitioner's Appendix B., pp. 13a-24a, and its Order for Compliance in Petitioner's Appendix C at pp. 25a-28a.

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The judgment of the Court of Appeals was entered on November 7, 1986 and is reprinted in Petitioner's Appendix D, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By statute in Ohio, fire department vacancies in positions above the rank of "regular fireman" must be filled by competitive promotional examinations. The relevant portions of the Ohio Revised Code (O.R.C. Sections 124.37, 124.45, 124.46, and 124.48) are set forth in Petitioner's Appendix E, pp. 31a-35a.

STATEMENT OF THE CASE

1. Statement of Facts

This class action was filed on March 20, 1973, on behalf of blacks who sought appointment as firefighters in the Division of Fire. The Complaint alleged that the Defendants, employees of the City of Cincinnati, were engaged in a pattern and practice of discrimination based upon race in recruiting, testing, selecting and hiring applicants for the position of fire recruit, and in the promotion of firefighters in the Division of Fire, in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

When this action was filed, blacks made up approximately one percent of the force (decision of District Court, 625 F. Supp. at 31, Pet. App. B, p.14a). There were *no* blacks in the promoted ranks. On May 7, 1974, the parties entered into a Consent Decree. The Petitioner-Union was not a party to the lawsuit at that time, and made no effort to intervene in the matter to object to the terms of the Decree. The Consent Decree provided for nondiscriminatory testing for hiring, and set a goal of increasing the percentage of blacks on the force to eighteen percent by 1980. That goal was not met by the City. In April, 1981, the Consent Decree was modified to give the City until the end of 1985 to meet the goal. (*Id.*)

The Decree also called for the use of affirmative action in promotions. Paragraph 27 provides that:

> "defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a workforce composition which negates any inference of an unlawfully discriminatory promotion policy based on race."

On August 28 1984, a civil service examination was conducted by the City of Cincinnati for promotion to the rank of Fire Lieutenant. An eligibility list was posted on September 26, 1984. A total of 231 applicants passed the test, 36 of whom were black. However, the highest ranking black on the list was number 23, followed by blacks ranked numbers 42, 43, and 67. If promotions were made in rank order from the eligibility list it was unlikely that more than one black would be promoted from the two-year eligibility list (decision of District Court, 625 F.Supp. at 31; Pet. App. B, p. 15a). On March 11, 1985, Respondent-Plaintiffs filed a Motion for Enforcement of Consent Decree. The City had promoted 19 persons from the list at that time, all of whom were white. (*Id.*)

When the motion was filed, it was clear that the City would not reach its goal of 18 percent minority representation by the end of 1985, as required in the 1981 decree modification. Eleven years after the effective date of the Consent Decree, blacks made up less than 15 percent of the force. This was so even though the relevant labor force for the City of Cincinnati is approximately 33 percent black.

At the time Respondent-Plaintiffs filed the Motion for Enforcement it was also evident that blacks were seriously underrepresented in the promoted ranks in the Division of Fire. Accordingly, Respondent-Plaintiffs' Motion for Enforcement sought an order that certain positions would be double-filled as was done in this case pursuant to the District Court's 1982 Order for Compliance. Only three (or 2.2 percent) of 137 drivers were black. Of the 105 lieutenants, only five (or 4.7 percent) were black. There was only one black captain out of a total of 48. There were no black district chiefs or assistant chiefs (decision of District Court, 625 F.Supp. at 33; Pet.

App. B, p. 19a). The Council of the City of Cincinnati recognized that blacks were underrepresented by a Resolution on October 10, 1984, and expressed its continuing support for affirmative action promotions. (*Id.*)

2. The Proceedings Below

Respondents-Plaintiffs are in agreement with the Statement of Proceedings in Respondent-Defendants' Brief in Opposition.

ARGUMENT

In the case of *Wygant* v. *Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842 (1986), Justice O'Connor, concurring in the judgment, harmonized the various positions taken by the Justices to describe the Court's test for judging the constitutionality of race conscious affirmative action plans. The first part of the two part test concerned the factual basis, and in this regard Justice O'Connor said:

> [T]he Court is in agreement that [the] . . . remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, supra, 106 S.Ct. at 1853.

Once the required factual basis exists, a remedial plan must fit the problem to be addressed. As Justice O'Connor stated at 106 S.Ct. 1853-54:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Respondents submit that the Court of Appeals correctly held that the enforcement order by the Trial Court clearly met this standard.

1. Although there was no contemporaneous finding of actual discrimination, there was a firm basis for believing that remedial action was required.

When this action was commenced in 1973, approximately one percent of Cincinnati Firefighters were black. None were in the promoted ranks. Although the consent decree contained a disclaimer of liability, it is manifest that there was a strong basis for believing that affirmative action was required.

Paragraph 27 of the Consent Decree requires the City to use affirmative action in promotions to "negate any inference of an unlawfully discriminatory promotion policy based upon race." When Respondent-Plaintiffs' Motion for Enforcement was filed, an inference of unlawfully discriminatory promotion policy clearly existed. It was an indisputable fact that blacks were seriously underrepresented in the promoted ranks, and that the results of the examination would do nothing to change this situation. In fact, it was anticipated that only

one black would be promoted during the life of the eligibility list if promotions were made in rank order.

Thus, there is no question that the Consent Decree required the City to engage in the use of affirmative action. The parties to the Consent Decree, Respondent-Plaintiffs and the City, both agree that the use of the double-fill plan approved by the Court is a proper interpretation of Paragraph 27 of the Decree. Indeed, the District Court determined that such relief was appropriate in its earlier 1982 Order for Compliance.

The Petitioners claim that the District Court, in its enforcement order, relied solely on the outcome of the 1984 promotional test. This is not accurate. The Court's finding of an inference of discrimination was based not only on the low placement of blacks on the test, but also on the continued underrepresentation of blacks, in the fire division as a whole, and especially in the promoted ranks.

2. The requirement of affirmative action in promotions consisting of double-filling of some positions does not unnecessarily trammel the rights of innocent individuals.

The Compliance Order does not "unnecessarily trammel" the interest of white firefighters. The plan simply calls for every sixth position to be double-filled with a black firefighter from the list of eligibles. No firefighter, black or white, will be denied a promotion to which they are entitled. No firefighter will be promoted later than they would otherwise be during the life of the eligibility list.

The Petitioner does not attempt to dispute these facts. Instead, it states that certain unidentified firefighters will suffer detriment that will not manifest itself until the cur-

rent Lieutenant's list expires in 1986, and a new eligibility list is posted some time in the future. According to the Petitioner, these unidentified members will be injured because their promotions will be delayed. The delay is attributed to the Court's Order for Compliance which provides that no vacancy shall occur upon the expiration of the eligibility list until all double-fills are absorbed into the complement.

The answer to the Petitioners' argument is all too simple and is stated by the Court of Appeals at 804 F.2d 363 (Pet. App. A, pp. 7a-8a):

> Since every vacancy during the life of each eligibility list was filled by appointing the highest ranked candidate from the list, there was no detriment to any ranked candidate during the life of the list. The expiration of each list meant that those whose names were on it were no longer eligible for promotion. All promotions after the expiration date would be made from a new list to be compiled on the basis of the scores achieved on a new promotion examination. The only change effected by the order for compliance related to the timing of a subsequent competitive exam following the expiration of an eligibility list.
>
> * * *
>
> Thus, the only detriment to any firefighter flowing from the order for compliance consisted of a delay in the time when he or she would become eligible to compete for promotion. No one was denied a promotion by operation of the absorption clause.

Moreover, the Petitioner erroneously assumes in its argument that the persons who will be at the top of the next promotion list will be white. Of course, there is

nothing to support that assumption. The only detriment to any firefighter, whether black or white, is delay in the time when he or she would become eligible to compete for promotion.

Firefighters Local No. 1784 v. *Stotts*, 467 U.S. 561 (1984) is inapplicable to this case. Here the Consent Decree and Compliance Order were voluntarily entered into by the City and Respondent-Plaintiffs. Further, as the Court of Appeals below noted at 804 F.2d 364 (Pet. App. A, p. 8a-9a):

> We agree with the appellees that *Stotts* is not controlling. In the present case the district court did not undertake to modify a consent decree by issuing an order concerning a matter on which the decree was silent. Rather, the court ordered compliance with a specific provision of the decree, the one related to a system of promotions. In addition, the order in this case did not affect any firefighter's seniority rights, and it did not involve layoffs. The loss of a job is obviously a more serious detriment to an employee than the delay in an opportunity to establish eligibility for a promotion.

The Court of Appeals' assessment with respect to detriment is correct. *See Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S.Ct. 3019, 3059 (1986) (Powell, J., concurring in part and in the judgment) (layoffs at issue in *Wygant*, *supra*, demanded closer scrutiny than hiring goals).

Finally, the District Court's order enforcing the 1974 decree is not invalid on the grounds that the beneficiaries of that order were not identified as actual victims of discrimination. Voluntarily-adopted remedies are per-

mitted under the Equal Protection Clause if they are based on sufficiently weighty government interests and are narrowly tailored to achieve their goals. *Wygant, supra*, 106 S.Ct. at 1846. *See Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S.Ct. 3019 (1986) and *Firefighters Local No. 93* v. *City of Cleveland*, ____ U.S. ____, 106 S.Ct. 3063 (1986) (courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices).

The plan adopted by the District Court is narrowly tailored in its purpose, and minimally intrusive to the interests of nonminority firefighters. As the Court of Appeals held regarding the short delay in promotional possibilities resulting from the Compliance order: "[t]his is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black firefighters from the promoted ranks." 804 F.2d at 365 (Pet. App. A, p. 12a).

CONCLUSION

The decisions of the lower Courts are supported fully by the reasoning of the majority of this Court in the judgment in *United States* v. *Paradise*, announced on February 25, 1987.

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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